

BRUCE W. GILLEY
Claimant

TACO TICO, INC.
Respondent

CNA INSURANCE COMPANIES
Insurance Carrier

ORDER

APPEARANCES

RECORD

STIPULATIONS

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, an assistant manager for Taco Tico, was on duty on May 28, 1991, when four (4) men entered claimant's restaurant to rob it. During the robbery, claimant was shot in the head with resulting injuries to the lower right side of his head and jaw. He underwent extensive surgery, including detailed dental reconstruction and psychological counseling. The total medical involved in claimant's treatment was in excess of \$120,000.

From the time claimant reached the emergency room, he was treated by John R. Provenzano, D.D.S., who, after multiple surgeries, had restored claimant's jaw line and interior mouth to where claimant had four (4) titanium posts sticking out of his gums. Claimant was then referred to another dentist for creation of false teeth and a false gum, involving the use of screws and metal implants. Claimant lost a portion of his mandible, as well as a portion of his tongue.

Dr. Provenzano, in evaluating claimant's functional impairment, found claimant's repaired mandible to be symmetric, smooth and natural. He found claimant's jaw movements to be functionally appropriate, with claimant being able to open his mouth within normal limits. He also opined claimant had no dietary restrictions, being able to chew anything he wanted. Even though claimant lost approximately fifteen percent (15%) of his tongue, there were still no complications associated with his use of the tongue once it had healed. There was nerve damage in the alveolar nerve which provides sensation to the teeth and lips and to the lingual nerve which gives sensation to the tongue and some of the tissues of the floor of the mouth. There was also some facial scarring associated with the surgery. Dr. Provenzano felt claimant had lost no ability in his speech patterns. In assessing claimant's functional impairment per the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, Dr. Provenzano rated claimant at one percent (1%) whole body functional impairment based upon the numbness of his lip and tongue. Dr. Provenzano provided no functional impairment as a result of the damage to the claimant's cranial nerves or for the facial scarring.

Claimant was evaluated at his attorney's request by Dr. Peter V. Bieri, a specialist in head and neck surgery, including ear, nose and throat and plastic surgical repair. Dr. Bieri had suffered a stroke in 1988 and had become disabled. Subsequent to that time, he retrained through the American Academy of Disability Evaluating Physicians, developing expertise in evaluating and rating injuries, in particular, head and neck injuries. He examined claimant in June 1994 finding claimant had sensory neural hearing loss, including tinnitus in the right ear. He also found facial disfigurement, a Class II deformity, including continuous scarring and mandible deformity. He assessed claimant a two percent (2%) whole body impairment. He gave claimant a ten percent (10%) whole body impairment for problems associated with mastication and deglutition, i.e, chewing and swallowing. He also assessed claimant a twenty percent (20%) impairment for functional speech deficit, which translates to a seven percent (7%) whole body impairment. All combined, Dr. Bieri assessed claimant a twenty-eight percent (28%) whole body functional impairment exclusive of any mental and behavioral disorders which, according to Dr. Lazarus L. Lampros, a clinical psychologist who treated claimant, may not have been related to claimant's injury.

The rating by Dr. Bieri appears excessive as the AMA Guide allows only a zero to five percent (0-5%) impairment for scarring, with claimant's scarring being described as relatively minimal. The AMA Guide also allows only a five to ten percent (5-10%) impairment if a person is limited to semi-solid or soft foods. In this case, there is no indication claimant had any chewing or swallowing limitations.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The medical testimony of Dr. Provenzano, in rating claimant's functional impairment, appears to ignore certain relatively obvious problems associated with claimant's ongoing symptomatology. Specifically, the loss of mandible and soft tissue and the damage to his Cranial Nerve No. V and Cranial Nerve No. VII, as well as difficulties encountered by claimant in chewing and swallowing. The impairment rating of Dr. Bieri, on the other hand, appears to allow considerable latitude regarding the impairment rating for claimant's scarring and the alleged limitations to claimant's diet. Neither doctor appears to have fully and accurately followed the AMA Guides in evaluating claimant's functional impairment.

K.S.A. 1990 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

While the law in effect at the time of claimant's injury does not mandate a use of the AMA Guides, if medical professionals use the Guides it must be insisted upon that the Guides be used properly in evaluating claimants' functional impairment. In this case, neither doctor accurately assessed claimant's total loss in awarding claimant a functional impairment. As such, the Appeals Board finds the evidence of Dr. Bieri and the evidence of Dr. Provenzano to be somewhat beneficial and somewhat suspect, each in its own way. The Appeals Board finds claimant has suffered a fifteen percent (15%) whole body functional impairment as a result of the injury suffered May 28, 1991. In resolving this

dispute between the medical evaluating physicians, the Appeals Board believes that the truth, while difficult at times to ascertain, does lie somewhere between Dr. Provenzano's one percent (1%) and Dr. Bieri's twenty-eight percent (28%). The Appeals Board finds claimant has suffered a loss of mandible and soft tissue, damage to the Cranial Nerve No. V and Cranial Nerve No. VII, has some loss in both chewing and swallowing and some facial scarring for which he should be compensated. There is also a dispute over whether claimant suffered damage to his speech patterns with Dr. Bieri indicating significant loss and Dr. Provenzano indicating no loss. The fifteen percent (15%) functional impairment awarded by the Appeals Board is a compromise of the medical evidence presented in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 13, 1995, shall be and is modified and claimant is granted an Award against respondent, Taco Tico, Inc., and its insurance carrier, CNA Insurance Companies, for an accidental injury sustained on May 28, 1991, for a 15% permanent partial general body disability.

Claimant is entitled to 144 weeks temporary total disability compensation at the rate of \$193.34 per week, totaling \$27,840.96, followed by 271 weeks permanent partial general body disability at the rate of \$29.00 per week, totaling \$7,859.00 for a 15% permanent partial general body disability making a total award of \$35,699.96.

As of August 29, 1995, there would be due and owing to claimant 144 weeks temporary total disability compensation at the rate of \$193.34 per week in the sum of \$27,840.96, plus 82.43 weeks permanent partial general body disability at the rate of \$29.00 per week in the sum of \$2,390.47, for a total due and owing of \$30,231.43, which is ordered paid in one lump sum, less amounts previously paid. Thereafter, claimant is entitled to 188.57 weeks permanent partial general body disability at the rate of \$29.00 per week in the sum of \$5,468.53, until fully paid or until further order of the Director.

Claimant is entitled to medical expenses per the Award of the Administrative Law Judge.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of Preliminary Hearing	\$120.80
Transcript of Preliminary Hearing	\$ 60.00
Transcript of Preliminary Hearing	\$105.80
Transcript of Regular Hearing	\$ 60.30
Deposition of John R. Provenzano, D.D.S.	\$451.40
Deposition of Lazarus L. Lampros, Ph.D.	\$428.00

Braksick Reporting Service

Deposition of Peter V. Bieri, M.D.

\$417.70

Deposition Services

Transcript of Preliminary Hearing

\$ 67.90

Transcript of Regular Hearing

\$176.00

IT IS SO ORDERED.

Dated this ____ day of October 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Hogan, Wichita, Kansas
D. Steven Marsh, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director